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No. 88-587

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

DENIS M. McNULTY,
Petitioner,

vs.

W. S. LIBBEY COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the First Circuit Court of Appeals err in affirming the Trial Court's finding that at the time of termination the parties' relationship was no longer governed by the contract entered into in December, 1976?

2. Did the First Circuit Court of Appeals err in affirming the Trial Court's finding that the relationship between the parties was an "at-will" employment relationship?

3. Did the First Circuit Court of Appeals err in affirming the Trial court's ruling entering Judgment Notwithstanding The Verdict in favor of Respondent despite the jury's finding in Petitioner's favor?

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OPINION BELOW

The opinion of the First Circuit Court of Appeals, which is not reported, appears in Appendix A.

JURISDICTION

The First Circuit entered its judgment and opinion on July 8, 1988. Petitioner filed his Petition for Writ of Certiorari within ninety days of the Notice of Entry of Judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the following pertinent statutory provisions are set forth in Appendix B, *infra:*

G. L. Ch. 93A, Section 11.

STATEMENT OF THE CASE

Petitioner (hereinafter "McNulty") had been a manufacturer's representative for textile mills for over 30 years. Commencing in approximately 1972, McNulty acted as a manufacturer's representative, on a non-exclusive basis, for Respondent W. S. Libbey Corporation (hereinafter "Libbey"), trying to establish new accounts for them. Primarily, McNulty sought to obtain drapery manufacturer customers for "malimo" fabric which was being developed by Libbey. McNulty worked on a commission basis. In December 1976, McNulty signed a written contract with Libbey. The contract provided:

> "1. You will receive 3% on all sales you generate, and 5% on sales where the price warrants it.
>
> "2. Your territory will be confined to New England and Up-State New York with the following exceptions. Those Shoe and Substrate accounts carried by our Shoe Salesmen, all Blankets and all Yarn sales, and the sales of Bedspreads to the Hotel and Motel chains.
>
> "3. You will receive credit on Ryan & Byers — whereby you will receive 3% on direct sales to them and a 1% commission on all commission sales thru them.
>
> "4. This *agreement* is for one year starting January 1, 1977 and *is self renewable* for another year if your sales for the year reach $500,000." (emphasis added)

From the signing of this agreement up until December, 1983, McNulty and Libbey continued to operate under these terms, with one minor modification which is not significant to the issues in this case. Every year, including 1983, McNulty's sales exceeded $500,000.00. McNulty understood that this written agreement was renewable from year to year and was still in full force and effect in December 1983. Accordingly, he also believed that termination of the contract could only be made on one year's notice. Libbey also seemed to believe one year's notice was appropriate.

McNulty primarily sought business for Libbey from four major accounts; Robertson Factories, Stanwood Draperies, Oxford Drapery and Max Kahn. McNulty brought Robertson factories and Stanwood Draperies, who had been long-time customers of McNulty even before his association with Libbey, to Libbey as customers. McNulty spent many years and significant time and effort trying to develop chain store retail outlets for malimo drapers made by Libbey for these potential customers.

Libbey's sale of malimo fabric developed slowly. Beginning in 1982 and 1983, Libbey began making significant progress in the sale of malimo through the efforts of McNulty. In late 1982 and 1983, Libbey began selling malimo fabric to Stanwood Draperies for sale to large chains, such as K-Mart, Bradley's and Zayre's. Also, in 1983, Sears first placed an order for Libbey malimo drapery, manufactured by Robertson Factories, in its catalogue. So, finally in 1983 McNulty's sales efforts began paying off.

"Coincidentally", as McNulty was on the verge of receiving substantial compensation for his more than eight years of hard work developing a market for Libbey's

malimo fabric, Libbey suddenly decided to "reorganize" its commissioned sales force. Prior to November 23, 1983, McNulty was only aware of mill management changes. During the first half of 1983, Libbey had several conversations with McNulty about the prospects of his malimo sales and, in the latter part of 1983, Libbey began its projections for 1984. At that time, Armand Favreau, Libbey's Controller, was working on "cost containment", including the sales representatives' commission structure. The projected commission for McNulty were included in the projection process. "Coincidentally", McNulty's projected commissions for 1984 were in excess of $100,000.00 At the time, Libbey's management personnel were all making substantially less than $100,000.00 per year. During this projection and "cost containment" process, Mr. Favreau suggested the concept of bringing McNulty in-house and did alternative cost projections based on such change. Then, on November 23, 1983, Libbey proposed a new business arrangement for McNulty.

At that time, Libbey proposed that McNulty become a full-time salaried employee at a fraction of his prior compensation. Libbey proposed a $40,000.00 per year salary, expenses, minimal life insurance and the possibility of serially reducing commission "bonus". ("The more you sell, the less you make.") McNulty indicated he would never accept those terms and was told: "We will work it out." "Don't worry about it." Based upon his projected sales, McNulty was expecting at least $240,000.00 in commissions for the next year.

On November 28, 1983 McNulty wrote a letter requesting the specifics of Libbey's proposal. Libbey responded by letter on December 2, 1983 setting forth terms similar to those conveyed orally and described above. Libbey's letter also described some of the changes in McNulty's job responsibilities, including his increased travel obliga-

tions and possible relocation from Massachusetts to Maine. Libbey requested that McNulty respond by December 16, 1983. On December 12, 1983, McNulty wrote a letter to Libbey rejecting its proposal.

Thereafter, an incident arose where Libbey's management went behind McNulty's back and reduced the price quoted to one of McNulty's customers after Libbey had told McNulty to convey to the customer that there would not be such a reduction. When McNulty learned of these events, he called Libbey and complained, using rough, but appropriate for the occasion, language. This telephone conversation between McNulty and Herschel Sternlieb, a Libbey Vice-President, took place on Friday, December 9, 1983. The following Monday, while calling on an order, McNulty asked to speak to Mr. Sternlieb, but was told Mr. Sternlieb was in New York and, accordingly, McNulty just left a message that he called.

Thereafter, that same morning, McNulty received a mailgram from Libbey withdrawing its offer of permanent employment and immediately terminating McNulty's business relationship with Libbey. Libbey also stated it would pay commissions on all orders already received, but no more.

In essence, Libbey used the pretext of a few "rough" remarks in a telephone conversation as its means of avoiding paying McNulty the commissions he had earned and would continue to earn in the future because: (i) their expected amount exceeded the income of Libbey's management, and, (ii) McNulty would not agree to an arrangement whereby his income from Libbey alone could be drastically reduced and he would have to give up the income he earned from the sales he made as a sales representative for other fabric manufacturers. As it turned out, his lost commissions for 1984 alone were

estimated at $201,788.71, and up to November 26, 1986 were estimated in excess of $414,000.00.

McNulty then commenced an action in the District Court of Massachusetts. McNulty's Amended Complaint plead four causes of action.

Count I sought damages for breach of contract based upon Libbey's failure to pay commissions due. Count II sought damages for breach of the implied covenant of good faith and fair dealing based upon Libbey's bad faith termination of McNulty's employment. County III sought damages for breach of the implied covenant of good faith and fair dealing based upon Libbey's bad faith termination of McNulty's employment and failure to pay commissions for past services. Count IV sought treble damages based on Libbey's unfair practices in violation of G.L. Ch. 93A, Section 11.

Counts I, II and III were tried to a jury. The jury was asked to answer these three questions: (1) "Did the defendant discharge plaintiff for just cause?"; (2) "What would have been the reasonable length of time for notice of termination?"; and, (3) "What would have been plaintiff's receipts by way of commissions earned during that period?"

The jury found that Libbey's discharge of McNulty was *not* for just cause. Based upon the Court's erroneous charge regarding interpretation of the subject contract, the jury found that the reasonable length of time for notice of termination was 90 days. Finally, based upon the Court's erroneous charge regarding computation of damages and improper phrasing of the question, which only permitted the jury to consider commissions to be earned when sales were actully plead, and not to consider that commissions could be earned on future sales for past services, the jury found that McNulty would have re-

ceived $52,000.00 in commissions during the first three months after discharge. The Court then posed a fourth question, "If your answer to Question 2 had been 'to December 31, 1983', what would be your answer to Question No. 3?". The jury ultimately responded "$12,000.00".

Thereafter, Libbey filed Motions For Judgment Notwithstanding The Verdict and for Judgment on Court IV in accordance with Motion For Directed Verdict; McNulty filed a Motion For A New Trial On The Issue Of Damages.

The Trial Court in its written opinion *agreed* with the jury that Libbey's discharge of McNulty *was in bad faith.* The Court then, however, incomprehensively, entered judgment for Libbey on all four counts. McNulty then appealed from such judgment.

On July 8, 1988 the United States Court of Appeals for the First Circuit affirmed the judgment of the district court. The Court, in affirming the District Court's Judgment Notwithstanding The Verdict on the first three counts and affirming Judge Aldrich's determination on Court IV, substantially adopted the District Court's finding that by the express terms of the contract entered into between the parties the contract expired no later than *December 31, 1978,* and that thereafter McNulty was left in an "at-will" state and further that Libbey did not violate any implied covenant of good faith and fair dealing. Therefore, the first three counts were held to have been properly determined against petitioner. With respect to Count IV, the First Circuit also sided with Judge Aldrich in his determination that relief under Chapter 93A was not appropriate.

This petition is presented because conflicts over the interpretation of cases dealing with this area of law have arisen. Furthermore, the First Circuit, in its unpublished

opinion in this case, seems to ignore the holding of *RLM Associates, Inc. v. Carter Manufacturing Corp.*, 356 Mass. 718, 240 N.E.2d 646 (1969) and the analysis therein; *despite being presented with a virtually identical set of facts.* Regrettably, the First Circuit has chosen to substitute its own analysis of substantive Massachusetts law in a manner contrary to, and without due regard for existing protections developed and embraced by the Massachusetts Courts.

ARGUMENT

I

SUMMARY OF ARGUMENT

After a jury trial, Judge Aldrich, in response to Respondent's Motion For Judgment Notwithstanding The Verdict "snatched a modest victory from McNulty". Judge Aldridge decided contrary to law and the facts that the subject contract was a one-year contract and that after its express terms had expired, the parties created an at-will employment relationship terminable by either party without notice.

Petitioner sets forth that the First Circuit's opinion, relying heavily on the District Court's opinion, misinterpreted a long line of precedent and has so far departed from such precedent so as to call for an exercise of this Court's jurisdiction.

By its departure from established precedent and misapplication of law, the District Court erred in granting Judgment Notwithstanding The Verdict and, so too, the Court of Appeals has followed this error by affirming the District Court's decision.

The failure of the First Circuit to give due regard and substantive weight to existing state court precedent and substitute instead its own myopic view of Massachusetts law merits close scrutiny and review by this Court. To

permit the First Circuit to substitute its own judgment in contravention of established state law and must be corrected.

II

THE DISTRICT COURT ERRED IN ENTERING JUDGMENT NOTWITHSTANDING THE VERDICT IN FAVOR OF RESPONDENT ON THE FIRST THREE COUNTS AFTER THE JURY DETERMINED THAT PETITIONER HAD BEEN DISCHARGED IN BAD FAITH. THE COURT OF APPEALS THEN ERRED IN AFFIRMING THE LOWER COURT.

At trial of the case, the jury found that Libbey discharged Petitioner in bad faith and not for just cause. However, the trial judge stripped petitioner of his victory and found that after a misperceived termination of the subject contractual agreement, an at-will relationship was established. Resolution of the propriety of Judge Aldrich's decision is dependent upon the interpretation of the employment contract, the implied dealings of the parties throughout their relationship and existing, well established, case precedent.

It is undisputed that Petitioner and respondent entered into a contract whereby he became a sales representative for Respondent. "This *agreement* [was] for one year starting January 1, 1977 and [was] *self renewable* for another year if [his] sales for the year reach[ed] $500,000." It is uncontested that McNulty's sales exceeded $500,000.00 every year thereafter and that the parties apparently continued under the terms of this agreement until Libbey discharged McNulty.

The plain meaning of the foregoing "self-renewability" clause, and McNulty's understanding thereof, was that

the *agreement* could be renewed yearly. One would reasonably expect that renewal of the agreement would include renewal of all of its terms, including the self-renewability term. If the parties intended otherwise, they could have stated that if the requisite sales were reached, McNulty would remain a sales representative on the same commission basis for only the year 1978. Thus, the trial court's findings and charge to the jury that this agreement ended after 1978 was erroneous and failed to give due weight to the conduct of the parties.

If the agreement was in force in December 1983, based upon McNulty's sales, it could not be terminated until December 31, 1984. For this reason it is apparent that consistent with the understanding of the parties, termination of the agreement *without* just cause would require one year's notice.

Furthermore, whether or not this agreement was in effect, the nature of this relationship evidences, as the parties understood, that one year would be a reasonable period of notice for termination of McNulty's sales representative relationship with Libbey.

Libbey clearly breached its contract with McNulty by not paying commissions already earned by McNulty based upon his past services and by terminating the subject contract prematurely without just cause, in contravention of the contract's terms. Accordingly, the Trial Court erred in granting Judgment Notwithstanding The Verdict and in determining that the contract could be terminated at will.

Both the Trial Court and the Court of Appeal terminate their analysis of the case and the relief sought once determining that an at-will relationship with no contractual obligations existed. However, whether McNulty's relationship with Libbey was subject to the agreement of

December, 1976, or was "at-will", such relationship was always subject to the implied covenant of good faith and fair dealing, which covenant was breached by Libbey's wrongful discharge of McNulty. [See: *Fortune v. National Cash Register* (*"Fortune"*), 373 Mass. 96 (1977); *Gram v. Liberty Mutual Insurance Co.* (*"Gram I"*), 384 Mass. 659 (1981); *Kravitz v. Merchants Distributors, Inc.*, 387 Mass. 457, 463 (1982). Such covenant applies to independent commissioned sales representatives as well as employees. *RLM Associates, Inc. v. Carter Manufacturing Corp.*, 356 Mass. 718, 248 N.E. 2d 646 (1969).]

Traditionally, an employment contract which was "at will" could be terminated by either side without reason. [See *Fenton v. Federal Street Building Trust*, 310 Mass. 609, 612 (1942).] However, Massachusetts now recognizes that employment at will contracts have an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of contract. [*Fortune v. National Cash Register*, 373 Mass. 96 (1977).]

The concept of "good faith" has not been expressly defined. While the mere absence of good cause to discharge an employee, while tending to negate the existence of good faith, does not by itself give rise to an enforceable claim for breach of a condition of good faith and fair dealing further conduct can indeed support such a finding. [*Siles v. Travenol Laboratories, Inc.*, 13 Mass.App. 354, 358 (1982).] In Siles, the court stated that the "plaintiff generally does not have an enforceable claim for a bad faith termination of an at-will employment contract unless he can show that: (1) the discharge involved an intent of the defendant to benefit financially at the plaintiff's expense, such as for the purpose of retaining for itself sales commissions or pension benefits which would otherwise be due to the plaintiff, or (2) that the em-

ployer's reason for the discharge was contrary to public policy." *Id.*, at 358.

Further, in *Fortune, supra*, the Court held that an employer is liable for breach of the covenant of good faith and fair dealing if it discharges a salesman in order to deprive him of future commissions related to his past services for the company.

Similarly, in *Gram I, supra,* the Supreme Judicial Court expanded the implied covenant of good faith and fair dealing expressed in *Fortune, supra,* to cover plaintiffs who are discharged without cause. Factually, the Court also expanded the right of a plaintiff to recover damages for breach of the covenant of good faith and fair dealing to include compensation derived from a defendant's future business which is connected to the past services of plaintiff.

RLM Associates, Inc. v. Carter Manufacturing Corp., 356 Mass. 718, 248 N.E.2d 646 (1969), dictates the theory to support reversal and the recovery sought by McNulty. In *RLM Associates,* RLM was hired to be a manufacturer's representative for Carter Manufacturing, which arrangement could be terminated by either party on thirty days' notice. RLM was entitled to a commission on all Carter's sales in RLM's territory. During this relationship, RLM discovered, and brought to Carter, the fact that the Navy was sending out invitations to bid on a project. Carter bid on the project and terminated RLM a few days before the bids were to be opened. Carter then was the successful bidder, and RLM sued for its commission. The Supreme Judicial Court found that RLM was entitled to its commission, stating:

> "The evidence permitted the conclusion that Carter's termination of the arrangement was *in part* based upon a *desire to avoid paying a commission to RLM.*

> The existence of such a motive would permit an influence that the termination was in bad faith. The charge and the denial of Carter's requests were consistent with principles stated in *Maloy v. Coldwater Seafood Corp.*, 338 Mass. 554, 561-564, 156 N.E.2d 61. RLM, entitled to a commission on any sale in the territory, was not bound to show to what extent it had contributed to obtaining the award, although evidence warranted the conclusion that RLM's efforts were as significant in this respect as could reasonably have been possible in this type of government procurement." *Id.* (Emphasis added.)

McNulty's claim for breach of the implied covenant and termination is even stronger than RLM's. Irrespective of the similarities in this case and *RLM, supra,* both Courts below chose to ignore this precedent and substitute instead their own misapplied and incorrect "vision" of existing law.

RLM Associates is part of an established line of cases which establish plaintiff's right to damages in these types of circumstances, the leading cases being *Fortune* and *Gram I.*

Fortune involved a salesman whose contract entitled him to receive bonuses for sales made in his territory as long as he was employed by the company. Sometime in late 1967, or early 1968, NCR developed a new cash register and Fortune contacted a customer in his territory in an effort to sell the machine. He scheduled a demonstration of the machine for October 1968. In November 1968, NCR wrote directly to the customer offering a special deal on the machines. The customer immediately signed an order for a large number of cash registers which would be delivered over a four year period at a purchase price of $5 Million. Although Fortune did not participate in the negotiation of the contract terms, he

was listed on the order as the "salesman credited" with the bonus amount of $92,079.99. Shortly after the consummation of the deal, before Fortune received *all* of the bonus commissions, NCR terminated him. Although the court found that under the terms of the express contract Fortune had received all the bonus commissions he was entitled to receive, NCR could be held liable for the unpaid bonuses Fortune would have received if NCR's actions in terminating his services as a salesman were in "bad faith". *Id.,* at 101.

Although *Fortune* concerned unpaid commissions on a sale the plaintiff worked on which was placed prior to his discharge, the court was not limiting its holding to compensation for services completed prior to the salesman's improper discharge:

> "Where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on *the brink of successfully completing the sale,* the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent. . . . Courts have often applied this rule to prevent overreaching by employers and the forfeiture by employees of benefit *almost earned* by the rendering of substantial services." *Fortune, supra,* at 104-05, citing *RLM Associates v. Carter Manufacturing Corp.,* 356 Mass. 718, 248 N.E.2d 646 91969) (emphasis added.)

In *Gram I,* the Court held that an employee who is terminated may recover compensation for past services *even* if he *cannot* show that his discharge was in bad faith. The plaintiff in *Gram I* was an insurance salesman. The Court held that although the evidence did not warrant the inference that the defendant discharged Gram for the purpose of appropriating his renewal commissions, the

fact remained that Gram lost reasonably ascertainable future compensation based on his past services. Gram had a reasonable expectancy of renewal commissions even though each renewal commission was contingent on the policyholder's decision to continue coverage with the defendant. *Id.*, at 671-72. The court also held that Gram's contribution to defendant's future income was not tenuous just because there was no guarantee that all of Gram's clients would renew their policies. Therefore, the Supreme Judicial Court remanded the case on the issue of damages and stated that Gram was entitled to have a jury determine the amount of renewal commissions he reasonably could have expected to receive, reduced by an amount which reflected any servicing of these accounts. *Id.*, at 673.

The last case of import on the issue of what a plaintiff is entitled to recover for a breach of the covenant of good faith and fair dealing is ***Maddaloni v. Western Massachusetts Bus Lines, Inc.***, 12 Mass.App. 236 (1981), *aff'd*, 386 Mass. 877 (1982). In ***Maddaloni***, the plaintiff was found to be an employee at will under a written contract which provided that as compensation for his services in helping the defendant obtain an ICC grant of interstate charter rights he would receive a 5% commission on the defendant's special charter revenue. In 1966, due to the plaintiff's efforts, the ICC granted the defendant interstate charter rights. The plaintiff received commissions on the defendant's charters for five months until a federal district court held that the ICC grant was erroneous and revoked the defendant's charter rights. Again in 1973 the plaintiff spent substantial time gathering information, preparing affidavits, travelling to Washington, D.C. and soliciting support for the defendant's application for interstate charter rights. The ICC granted the defendant interstate charter rights and the company began to operate under those rights. The plaintiff received his 5%

commission on the defendant's charter revenues for only three months before be was fired.

Maddaloni brought suit against the defendant for breach of the covenant of good faith and fair dealing. As evidence on the issue of damages, Maddaloni testified to the amount of commissions he earned during the five months in 1966 and during the three month period in 1973 prior to his discharge. Maddaloni also read into the record the defendant's charter income from 1970 to 1976 which was stated in the defendant's annual reports. Lastly, Maddaloni testified without objection that he was 59 years old and had expected to retire at age 65 as he had told the defendant.

The jury was instructed to answer two questions if they found that the plaintiff had been discharged in bad faith:

> "1. If the plaintiff had not been discharged, what do you find is the fair amount of commissions that he could reasonably be expected to earn during his employment by the defendant at the rate of 5% commission on the total Special and Charter revenue income as reported to the Massachusetts Department of Public Utilities and the Interstate Commerce Commission after January 19, 1974?
>
> "2. Of the amount that you have found in Question #1, what part is attributable to Mr. Maddaloni's work and efforts in obtaining charter business for Western Massachusetts Bus Lines, Inc.?" *Id.*, at 245.

The jury found that the plaintiff reasonably could have expected to earn $61,000.00 in commissions and the part attributable to his efforts in obtaining the charter business was $28,000.00. The judge entered judgment in the amount of $28,000.00. The plaintiff appealed.

The Court of Appeals revised the judgment and held that "[t]he law protects the expectation interest of the person who had made a favorable contract and has abided by it." *Id.*, at 246. The plaintiff therefore was entitled to the full $61,000.00 which the jury found was the amount of commissions he could have made with the company until he retired.

On further appeal, the Supreme Judicial Court affirmed the Appeals Court's decision and rejected defendant's argument that *Fortune* applied only to commissions actually "vested" at the time of discharge. The Court stated that the obligation of good faith and fair dealing is imposed "to prevent an employer from being unjustly enriched by depriving the employee of money fairly earned and legitimately expected." [*Maddaloni v. Western Massachusetts Bus Lines, Inc.*, 386 Mass. 877, 883-84 (1982).]

A review of the facts of McNulty's case and the case precedent reviewed, *supra*, clearly requires a finding that the lower courts were not justified in finding that Libbey was entitled to Judgment Notwithstanding The Verdict. Such decision involves such a substantial departure from existing state law precedent and creates such inequity that it requires this Court's intervention. To permit such a verdict to stand would result in a complete failure to give due regard to existing state law.

III

THE DISTRICT COURT AND FIRST CIRCUIT COURT OF APPEALS ALSO ERRED IN DETERMINING THAT PETITIONER WAS NOT ENTITLED TO RECOVER FOR VIOLATION OF G.L. CHAPTER 93A.

G.L. Ch. 93A, Section 11 provides that "any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, . . . as a result of the use of employment by another person who engages in any trade or commerce of . . . an unfair or deceptive act or practice . . . may bring an action in the Superior Court. . . ." Relief under this chapter is in addition to relief which may be granted under traditional tort or contract law. [*Linthicum v. Archambault*, 379 Mass. 381 (1979).] It is also important to note that, even if there is no actual or substantial damage shown, but there has been an invasion of one's property, the law implies that one is entitled to nominal damages. [*Jarvis v. DePreza*, 2251 Mass. 447, 448 (1925).] The right to conduct a lawful business is a property right. [*Godin v. Niebuhr*, 236 Mass. 350, 351 (1920).] A plaintiff may recover under G.L. Ch. 93A, if only for nominal damages, if there is damage to his business or business reputation. *See, Mott v. Kulesza*, 1984 Mass.App.Div. 169 (1964), where plaintiff recovered $75.00 plus attorney's fees under G.L. Ch. 93A, Section 11, and the $75.00 sum represented $25.00 nominal damages trebled.

Although a plaintiff is not guaranteed an award of treble damages if a court finds that a defendant engaged in unfair or deceptive practices, a plaintiff may be awarded treble damages if "the Court finds that the use or employment of . . . act or practice was a willful or knowing violation of chapter 93A." G.L. Ch. 93A, Sections 2 and 11. In addition, a successful plaintiff may be

awarded reasonable attorneys' fees, costs, and any other equitable relief as a court deems necessary and proper. [If Libbey's conduct is found violative of Chapter 93A, the trial court already has held that McNulty "should be entitled . . . to *all* the Chapter 93A trimmings."]

The existence of unfair or deceptive acts and practices must be determined from the circumstances of each case. [*Spence v. Boston Edison Co.*, 390 Mass. 604, 616 (1983).] The evidence shows that Libbey willfully engaged in an unfair practice when it terminated McNulty as a commissioned sales representative. As soon as Libbey realized that it would have to pay McNulty substantial commission on his sale of malimo fabric, Libbey "coincidentally" decided to bring McNulty in-house as an employee of the company. Clearly, this was orchestrated to avoid paying him substantial projected commissions. The new employment offer was a sham. Not only was the offer of employment at a *drastically* reduced compensation level, but the new job would have required McNulty to move to Maine. When Libbey's tactic to avoid paying McNulty the high contractually required commissions by making him an employee salesman failed, Libbey then created a new "reason" to terminate McNulty as a commissioned sales representative. The heated telephone conversation was a direct result of Libbey's Vice-President Sternlieb's decisions to undermine McNulty's credibility with one of his customers by contacting the customer directly and cutting the price McNulty had previously quoted. This willful and unfair behavior on the part of Libbey entitles McNulty to treble damages and attorneys' fees under G.L. Ch. 93A, Section 11.

IV

CONCLUSION

The foregoing facts and law amply demonstrate that the Trial Court erred in charging the jury on the law, in interpreting the facts and in granting Judgment Notwithstanding The Verdict. So too the First Circuit erred by adopting without careful analysis or due consideration Judge Aldrich's decision below. Accordingly, Petitioner respectfully submits that because the judgment is in direct contravention of existing Massachusetts law and specifically goes against the considerable weight of existing and extablished precedent, this Petition should be granted.

Dated: October 3, 1988.

Respectfully submitted,

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NOT FOR PUBLICATION

No. 87-1285

United States Court of Appeals
For the First Circuit

DENIS M. MCNULTY,
Plaintiff, Appellant,

v.

W.S. LIBBEY COMPANY,
Defendant, Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Bailey Aldrich,* *Senior U.S. Circuit Judge*]

Before
Campbell, *Chief Judge*,
Torruella and Selya, *Circuit Judges.*

Steven J. Miller with whom *Peter J. McNulty* and *Law Offices of Peter J. McNulty* were on brief for appellant.

Mary E. O'Neal with whom *Andrew C. Culbert* and *Cargill, Masterman & Culbert* were on brief for appellee.

July 8, 1988

Per Curiam. Plaintiff-appellant Denis M. McNulty is a former manufacturer's representative who acted, *inter alia,* as a nonexclusive sales agent for fabric lines designed and manufactured by W.S. Libbey Company, defendant-appellee. After the relationship between the parties had endured for some eleven years, Libbey sev-

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*Of the First Circuit, sitting by designation.

ered it, under rather disagreeable circumstances, in December of 1983. Plaintiff, upset no little by defendant's abandonment of the parties' business arrangement, sued. In his amended complaint — which contained four counts — he claimed breach of contract, breach of an implied covenant of good faith and fair dealing, and commission of unfair trade practices in violation of Mass. Gen. L. c. 93A. Following trial, the jury returned a verdict for the plaintiff upon special interrogatories, *see* Fed. R. Civ. P. 49(a), in the amount of $52,000 with respect to the first three (contract and implied covenant) counts. The district court, however, snatched defeat from the jaws of plaintiff's modest victory. It granted judgment in Libbey's favor, *non obstante veredicto,* Fed. R. Civ. P. 50(b), setting the jury verdict aside. *See McNulty* v. *W.S. Libbey Co.*, Civ. No. 84-3851, slip op. at 4-9 (D. Mass. March 4, 1987) (available on WESTLAW, DCT File). The court, acting without a jury in accordance with Massachusetts practice, also ruled against McNulty on the chapter 93A claim. *Id.* at 9-11. Plaintiff prosecuted this appeal.

We restate briefly the principles which govern our review of the judgment n.o.v.:

> . . . [w]e may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence. *Miranda* v. *Munoz*, 770 F.2d 255, 257 (1st Cir. 1985). Rather, we must examine the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to the nonmovant. *Fishman* v. *Clancy*, 763 F.2d 485, 486 (1st Cir. 1985); *Cazzola* v. *Codman & Shurtleff, Inc.*, 751 F.2d 53, 54 (1st Cir. 1984). Put another way, "[w]e take the facts as shown by the [nonmovant's] evidence and by at least such of [movant's] uncontradicted and unimpeached evidence as, under all the

> circumstances, the jury virtually must have believed." *Karelitz* v. *Damson Oil Corp.*, 820 F.2d 529, 530 (1st Cir. 1987). A judgment notwithstanding the verdict should be granted only when the evidence, viewed from this perspective, is such that reasonable persons could reach but one conclusion. *Hubbard* v. *Faros Fisheries, Inc.*, 626 F.2d 196, 199 (1st Cir. 1980); *Harrington* v. *United States*, 504 F.2d 1306, 1311 (1st Cir. 1974).

Wagenmann v. *Adams*, 829 F.2d 196, 200 (1st Cir. 1987). The standard by which we assess the court's findings on Count IV is considerably more deferential. Inasmuch as the judge sat on the chapter 93A claim both as factfinder and as law-interpreter, his determinations can be disturbed only if we perceive them to be "clearly erroneous" or contrary to law. Fed. R. Civ. P. 52(a); *see generally Irons* v. *FBI*, 811 F.2d 681, 684 (1st Cir. 1987).

We have carefully reviewed the nisi prius record and believe that judgment n.o.v. was properly granted on the first three counts. Under the applicable law and mindful of the evidence presented at trial, reasonable minds could reach no conclusions contrary to those drawn by the court below. As to the fourth count, the matter is plainer still. Insofar as we can tell, the district court labored under no misapprehension of law, and the judge's findings leave us with no "definite and firm conviction that a mistake has been committed." *RCI Northeast Services Division* v. *Boston Edison Co.*, 822 F.2d 199, 203 (1st Cir. 1987), quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

We see no reason to belabor the obvious. The written contract between the parties, by its unmistakable terms, expired no later than December 31, 1987. That, in itself, defeated plaintiff's Count I assertion. It also left McNulty in an "at-will" status at the critical juncture. Even though

Libbey was lacking good cause to terminate the relationship — the jury expressly so found — we agree with the district court that, on this record, appellee could jettison plaintiff without notice, and did not violate any implied covenants of good faith or fair dealing in the process. Thus, Counts II and III were rightly dismissed. As to Count IV the district court found "small-time Machiavellian behavior," slip op. at 9, but nothing so egregious as to excite the interest of chapter 93A.[1] Given that, in Massachusetts, transgression of chapter 93A requires "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce," *Wasserman* v. *Agnastopoulos*, 22 Mass. App. Ct. 672, 679, 497 N.E.2d 19, 23, *rev. denied*, 398 Mass. 1105, 499 N.E.2d 298 (1986), quoting *Levings* v. *Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504, 396 N.E.2d 149, 153 (1979), we cannot say the court erred in finding Libbey's behavior — whether or not a model of tenderness — to have been above basement level.

The court below perspicaciously analyzed the matter, correctly gauged the scope and purport of the applicable authorities, and lucidly explained the reasons why the judgment n.o.v. and the chapter 93A ruling necessarily followed. It would serve no useful purpose for us to repastinate ground so thoroughly tilled below. We, therefore, substantially adopt the district court's opinion and affirm on the basis thereof. We add only that Judge

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[1]Because plaintiff did not prove that defendant's conduct invaded terrain protected by chapter 93A, we need not reach — and express no opinion on — Libbey's claim that the statute does not apply to disputes between manufacturer's representatives and their principals. *Cf. Manning* v. *Zuckerman*, 388 Mass. 8, 14, 444 N.E.2d 1262, 1263-66 (1983) (chapter 93A has no pertinence in employer/employee dispute); *Newton v. Moffie*, 13 Mass. App. Ct. 462, 467-69, 434 N.E.2d 656, 658-60 (1982) (chapter 93A held inapplicable to transaction between partners.).

Aldrich's pithy discussion of the Massachusetts "implied covenant" cases, slip op. at 7-9, has been confirmed and strengthened by our recent decision in *King* v. *Mannesman Tally Corp.*, No. 87-1693, mem. op. at 2-3 (1st Cir. Apr. 4, 1988) (per curiam) (applying Massachusetts law).

One last point. Plaintiff argues on appeal that, in any event, he was entitled to an award of roughly $6175 representing a commission due, but unpaid, on an order received from a customer, Oxford Drapery, before his firing. *See* Appellant's Brief at 8, 11; Reply Brief at 4-5. He pieces this assertion together by reference to snippets of evidence, here and there.[2] We decline to consider the contention for it was not raised below, explicitly or by fair implication, either during trial or in appellant's lengthy Rule 59 motion and memorandum in the district court following judgment n.o.v. As we have repeatedly warned, courts, unaided by the parties, should not be brought to book for failing spontaneously to find a needle in a haystack. *See Mele* v. *Fitchburg District Court*, No. 88-1019, slip op. at 13 (1st Cir. June 15, 1988); *Rivera-Gomez* v. *Adolfo de Castro*, 843 F.2d 631, 632 (1st Cir. 1988). Since points not advanced in the district court cannot be

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[2]To support this proposition, appellant cites principally to a terse exchange near the end of his trial testimony. Record Appendix 250-52. He acknowledged having received some $87,000 in commissions from Libbey in 1984, attributable to orders in-house when he departed. *Id.* at 250. When asked if he had been "paid for all orders received . . . prior to . . . termination," *id.*, he stated that "there was one in question." *Id.* McNulty was unable to give an exact figure for the commission allegedly due — indeed, he claims two different amounts in his opening brief and his reply brief — and the underlying order from Oxford Drapery, as far as we can tell, was not introduced into evidence. On this record, one would have to guess at its terms. Given the fact that plaintiff had the devoir of persuasion, we think the supposed commission, in any event, not proven.

raised for the first time on appeal, *Clauson* v. *Smith*, 823 F.2d 660, 665-66 (1st Cir. 1987), the argument stands procedurally defaulted.

We need go no further. From what has already been said, it is readily apparent that the judgment below must be

Affirmed.

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No. 87-1285

United States Court of Appeals

FOR THE FIRST CIRCUIT

DENIS M. MCNULTY,
Plaintiff, Appellant,

v.

W.S. LIBBEY COMPANY,
Defendant, Appellee.

JUDGMENT

Entered: July 8, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the district court is affirmed.

§ 2. Unfair Methods of Competition, etc., Declared Unlawful; Legislative Intent; Duties of Attorney General; etc.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the

Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended. (1967, 813, § 1; 1978, 459, § 2.)

Editorial Note —

The 1978 amendment added the words "in actions brought under sections four, nine and eleven," in paragraph *(b)*.

Cross References —

As to statute making violation of Consumer Credit Protection Act a violation of ALM GL c 93A, sec ALM GL c 140D § 34.

§ 11. Action for Damages; Injunction; Class Action; Settlement, etc.; Attorneys' Fees and Costs.

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act of practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such

equitable relief, including an injunction, as the court deems to be necessary and proper. (Amended by 1985, 278, § 1, approved September 18, 1985, effective 90 days thereafter; 1986, 363, § 1, approved, with emergency preamble, July 28, 1986; by § 5 applicable to actions brought or maintained on or after Dec. 17, 1985.)

Such person, if he has not suffered any loss of money or property may obtain such an injunction if it can be shown that the aforementioned unfair method of competition, act or practice may have the effect of causing such loss of money or property. (Amended by 1985, 278, § 2, approved September 18, 1985, effective 90 days thereafter; 1986, 363, § 2, approved, with emergency preamble, July 28, 1986; by § 5 applicable to actions brought or maintained on or after Dec. 17, 1985.)

Any person entitled to bring such action may, if the use or employment of the unfair method of competition or the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.

A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as hereinafter

provided, with provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages, also as hereinafter provided. No rights to equitable relief shall be created under this paragraph, nor shall a person asserting such claim be able to assert any claim on behalf of other similarly injured and situated persons as provided in the preceding paragraph. The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a claim under this section, except that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of said section two. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The respondent may tender with his answer in any such action a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner, then the court shall not award more than single damages.

If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action.

In any action brought under this section, in addition to the provisions of paragraph (b) of section two, the court

shall also be guided in its interpretation of unfair methods of competition by those provisions of chapter ninety-three known as the Massachusetts Antitrust Act. (Amended by 1986, 363, § 3, approved, with emergency preamble, July 28, 1986; by § 5 applicable to actions brought or maintained on or after Dec. 17, 1985.)

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth. (Added by 1985, 278, § 3, approved September 18, 1985, effective 90 days thereafter, amended by 1986, 363, § 4, approved, with emergency preamble, July 28, 1986; by § 5 applicable to actions brought or maintained on or after Dec. 17, 1985.)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 3, 1988, I served the within Petition for Writ of Certiorari in re: "Denis M. McNulty vs. W.S. Libbey Company" in the United States Supreme Court, October Term 1988. No.....

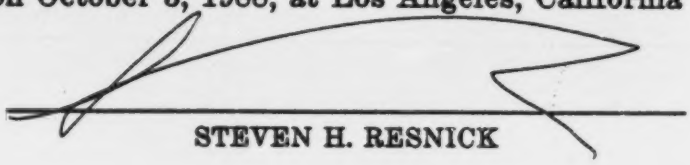
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Mary E. O'Neal
Andrew C. Culbert
Cargill, Masterman & Culbert
One Lewis Wharf
Boston, Massachusetts 02110

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on October 3, 1988, at Los Angeles, California



STEVEN H. RESNICK